IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

TERRIE L. GUNDERSON,	)	**No. 29702-1-III**
	)	
Appellant,	)	
	)	
v.	)	
	)	
CITY OF MILLWOOD, WASHINGTON,	)	
	)	
Respondent	)	
	)	
RED DIAMOND CONSTRUCTION, INC., d/b/a RED DIAMOND CONSTRUCTION; PHI KAI ENTERPRISES; a Washington General Partnership; BLACK REALTY MANAGEMENT, INC., a corporation; SEAN McMASTERS and MARIA McMASTERS, husband and wife, individually and as a martial community; and JOHN WATSON and BILLIE JO WATSON, husband and wife, individually and as a marital community,	)	**Division Three**
	)	
Defendants.	)	**UNPUBLISHED OPINION**

Korsmo, A.C.J. — Terrie Gunderson appeals the summary judgment ruling that

dismissed her suit against the city of Millwood (Millwood). She argues that there were genuine issues of material fact relating to her inverse condemnation and negligence claims. We disagree and affirm.

FACTS

In February of 2009, Ms. Gunderson began operating the "Sun Beans" coffee shop and tanning salon, located at 3117 N. Argonne Road in Millwood. Argonne Road runs north/south, and Sun Beans was located on the west side of the road just south of a set of railroad tracks intersecting Argonne Road. Millwood began construction on May 4, 2009, to repair Argonne Road. In order to minimize disturbance to local business, the construction took place between the hours of 7:00 p.m. and 5:30 a.m., Monday through Friday. Work was occasionally conducted during the day in order to expedite the project. The project narrowed Argonne from four lanes to two (one in each direction). Although southbound traffic was permitted to turn west, northbound traffic was not permitted to do so in order to ease congestion. According to Millwood, Argonne access to Sun Beans was only denied for half of one day in order to repair and pave the road in front of the business. According to Ms. Gunderson, it was denied for a period of 10 days.

In addition to southbound Argonne Road, drivers could also access Sun Beans from the west via a 50-foot wide Spokane County right-of-way running parallel to the

railroad tracks. This right-of-way is reached from Marguerite Road, which is parallel to Argonne Road. The county permitted construction crews to use the right-of-way to stage equipment and place dirt; they used only the northern half while keeping the southern half clear to permit ingress and egress for Sun Beans and a nearby apartment complex. Ms. Gunderson asserted that as her business was suffering throughout the project, she contacted the Millwood city clerk and complained about the quality of the access via the right-of-way. She also asserts that she attended city hall meetings and was assured that problems would be taken care of, though she is unable to say which meetings, or when she was there, or with whom she spoke. Construction was substantially completed on August 21, 2009. Around the same time, Ms. Gunderson forfeited her business because she had failed to make her monthly payments.

Ms. Gunderson filed suit against Millwood[1] in November 2009, alleging negligence, gross negligence, intimidation, reckless infliction of emotional distress, inverse condemnation, and dereliction of duty. The crux of her suit was that she was forced out of business by the road repair. Millwood successfully moved for summary judgment. Ms. Gunderson timely appealed, raising only the inverse condemnation and negligence issues.

[1] She also sued the contractors, her landlord, the sellers, and a real estate agency. Those matters were resolved separately and are not involved in this appeal.

ANALYSIS

This appeal asks us to decide whether the trial court erred in granting summary judgment on the two noted claims. Each is discussed in turn.

This court reviews a summary judgment order *de novo*, and our inquiry is the same as the trial court. *Lunsford v. Saberhagen Holdings, Inc.*, 166 Wn.2d 264, 270, 208 P.3d 1092 (2009). Thus, we view all facts and inferences in the light most favorable to the nonmoving party. *Id.* Summary judgment is proper if there are no issues of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). The party opposing summary judgment "may not rely on speculation, argumentative assertions that unresolved factual issues remain, or having its affidavits considered at face value." *Seven Gables Corp. v. MGM/UA Entm't Co.*, 106 Wn.2d 1, 13, 721 P.2d 1 (1986).

Inverse Condemnation

"No private property shall be taken or damaged for public or private use without just compensation having been first made." Wash. Const. art. I, § 16. An inverse condemnation claim is an action that seeks to recover the value of the property that the government appropriated without a formal exercise of its eminent domain powers. *Fitzpatrick v. Okanogan County*, 169 Wn.2d 598, 605, 238 P.3d 1129 (2010). A party alleging an inverse condemnation must establish (1) a taking or damaging (2) of private

property (3) for public use (4) without just compensation being paid (5) by a governmental entity that has not instituted formal condemnation proceedings. *Id.* at 606.

Ms. Gunderson argues that each element of the inverse condemnation claim was established. The parties do not dispute that Ms. Gunderson's interest was in private property, and that she was not paid for any possessory interest taken by Millwood. Thus, the two elements at issue are whether a taking occurred and whether the taking was for public use.

In order to constitute a taking, a governmental intrusion must be "chronic and unreasonable," and not simply a temporary interference that is unlikely to reoccur. *Lambier v. City of Kennewick*, 56 Wn. App. 275, 283, 783 P.2d 596 (1989), *review denied*, 114 Wn.2d 1016 (1990). The intrusion must also be either the direct or proximate cause of the landowner's loss. *Id.* at 283 n.4. Here, Ms. Gunderson argues that, because she was driven out of business, the interference was permanent. However, the question is not whether any alleged *damage* is permanent, but whether the *intrusion* itself is of a nontemporary nature, and was the direct or proximate cause of the landowner's loss. *Id.*

The record does not demonstrate anything that could be characterized as a "chronic and unreasonable" intrusion by the government. There were at least two

separate ways to access Sun Beans, even if they were less than ideal due to the road construction. Importantly, the record also shows that, even if loss of access by means of Argonne Road was an intrusion and there was a 10-day closure, it was still temporary in nature. Moreover, road repairs are unlikely to occur again in the near future. This case is unlike *Lambier* where a road construction design resulted in automobiles repeatedly crashing into the plaintiff's property. While irregular in occurrence, the problem was repeating and chronic, constituting a taking. *Id*. at 282-283.

Here, there is no material fact relating to a governmental intrusion that was "chronic and unreasonable" and of a nontemporary nature.[2] Because Ms. Gunderson is unable to show a genuine material issue as to whether a taking occurred, her claim fails and we need not address her argument regarding the public use element. The trial court correctly dismissed this claim.

Public Duty Doctrine

Next, Ms. Gunderson argues that the trial court erred in dismissing her negligence claim, arguing that there are genuine issues of material fact relating to whether Millwood owed a duty of care under an exception to the public duty doctrine.

[2] We also note that the road construction did not take the business; rather, it was lost because the requisite monthly lease and purchase payments of $2,159 were not made despite revenue in excess of $42,000 while Ms. Gunderson operated the business. Clerk's Papers at 26-27, 115, 117-124.

In 1967, the Legislature abolished sovereign immunity:

> All local governmental entities, whether acting in a governmental or proprietary capacity, shall be liable for damages arising out of their tortious conduct, or the tortious conduct of their past or present officers, employees, or volunteers while performing or in good faith purporting to perform their official duties, to the extent as if they were a private person or corporation.

RCW 4.96.010(1).

The enactment of RCW 4.96.010 permitted tort suits against a governmental entity. However it did not create any new causes of action, duties, or liabilities where none existed before. *J&B Dev. Co. v. King County*, 100 Wn.2d 299, 304-305, 669 P.2d 468 (1983), *overruled on other grounds by Taylor v. Stevens County*, 111 Wn.2d 159, 759 P.2d 447 (1988). Thus, in any negligence action against a governmental entity, the threshold determination is whether a duty of care was owed to the injured plaintiff individually rather than to the public in general; this is known as the public duty doctrine. *Babcock v. Mason County Fire Dist. No. 6*, 144 Wn.2d 774, 785-786, 30 P.3d 1261 (2001). The classic expression of the public duty doctrine is that "a duty to all is a duty to no one." *Taylor*, 111 Wn.2d at 163.

There are four exceptions to the public duty doctrine: (1) legislative intent, (2) failure to enforce, (3) the rescue doctrine, and (4) a special relationship. *Cummins v. Lewis County*, 156 Wn.2d 844, 853 n.7, 133 P.3d 458 (2006) (citing *Babcock*, 144 Wn.2d

at 786). A plaintiff must successfully argue that she falls within one of the four exceptions to the public duty doctrine in order to demonstrate that she was owed a duty of care by a governmental entity. *Id.* at 853. Here, Ms. Gunderson alleges that Millwood owed her a duty under both the rescue and special relationship exceptions.

Rescue Doctrine. One who undertakes to render aid or warn someone in danger is required to exercise reasonable care in his or her efforts. *Brown v. MacPherson's, Inc.*, 86 Wn.2d 293, 299, 545 P.2d 13 (1975). Where that person fails to exercise reasonable care and the offer to render aid is relied upon, the rescuer may be liable for negligence. *Chambers-Castanes v. King County*, 100 Wn.2d 275, 285 n.3, 669 P.2d 451 (1983). This doctrine applies even if the state agent is acting gratuitously, or beyond his or her statutory authority. *Id.* Ms. Gunderson contends that this doctrine applies since Millwood undertook to provide access to her property and failed to do so.

However, her argument lacks the necessary element of distress. The purpose of the rescue doctrine is to impose a duty where the government affirmatively undertakes to either warn someone of danger or render aid. *Brown*, 86 Wn.2d at 299. Ms. Gunderson does not allege, nor does the record show, that she was in any danger or that Millwood undertook to render aid. Thus, there is no genuine issue of material fact relating to this exception.

Special Relationship. Under the special relationship exception a government entity may be liable to an individual where a relationship either exists, or has developed, between the plaintiff and the municipality's agents such that a duty to perform a mandated act for a particular person or class exists. *Chambers-Castanes*, 100 Wn.2d at 285. A special relationship exists where: (1) there is direct contact or privity between the public official and the injured plaintiff which sets that person apart from the general public, (2) there are express assurances given by a public official, and (3) the plaintiff justifiably relies upon those assurances. *Beal v. City of Seattle*, 134 Wn.2d 769, 785, 954 P.2d 237 (1998). Here, Ms. Gunderson argues that all three are met since she (1) had direct contact with Millwood, (2) Millwood gave express assurances that she and everyone else would have access to her business, and (3) she relied upon these assurances.

In special relationship cases, the term "privity" is generally used in a broad sense and refers to the relationship between the government and "any reasonably foreseeable plaintiff." *Babcock*, 144 Wn.2d at 786. The direct contact or privity between the public official and the injured plaintiff must set that plaintiff apart from the general public. *Id.*

The plaintiff in *Chambers-Castanes* was assaulted by two men. *Chambers-Castanes*, 100 Wn.2d at 278. King County operators received 11 calls for help from the

time of the incident until the police arrived approximately an hour and twenty minutes later. *Id.* The Supreme Court concluded that privity existed between King County and the plaintiff because a transcript demonstrated that the emergency operators had explicitly stated that help was on its way. *Id.* at 279. Similarly, in *Beal*, the Supreme Court also found privity between the emergency operator and the person calling where the operator told the person that the police were being sent to assist her. *Beal*, 134 Wn.2d at 774. Finally, in *Babcock*, the court held that privity existed where an unknown firefighter made a statement to the appellants at their home. *Babcoc*k, 144 Wn.2d at 788. These cases demonstrate that minimal direct verbal contact is all that is necessary to establish privity.

Viewing the record in Ms. Gunderson's favor, there appears to be a genuine material issue as to whether privity existed, since she spoke with the city clerk about the right-of-way, complained at a city council meeting, and was told that Millwood would provide "safe access." These statements certainly provide at least a colorable question of fact as to whether privity existed between Ms. Gunderson and Millwood.

The next element is whether Millwood gave her express assurances. A governmental authority may be liable to an individual where he or she specifically seeks assurances from a governmental entity, and assurance is expressly given. *Babcock*, 144

Wn.2d at 789. The governmental duty cannot arise as the result of implied assurances. *Id.* Thus, a duty arises only where a direct inquiry is made by an individual, the public official sets forth specific, *incorrect* information that is intended to be relied upon, and the individual actually relies upon it. *Id.*

In *Chambers-Castanes*, the Supreme Court found that express assurances were made when the 911 operator specifically assured the caller that a police officer was coming. *Chambers-Castanes*, 100 Wn.2d at 287. Similarly, in *Beal*, express assurances were found to have been given when a 911 operator told the caller that police would be dispatched to assist her. *Beal*, 134 Wn.2d at 785. Conversely, in *Babcock* the Supreme Court found that no express assurances had been given by an unknown firefighter where the plaintiffs had not sought any assurance from her, despite the fact that she made a statement regarding protection of the Babcock's valuables. *Babcock*, 144 Wn.2d at 791. The court reached this conclusion in part due to the vagueness of the statements allegedly made by the firefighter, which distinguished it from the detailed express assurances given by the emergency operators in *Chambers-Castanes* and *Beal*. *Id.*

Here, the record contains no express assurances that relayed incorrect information. As noted previously, a party opposing summary judgment is not entitled to have its affidavits considered at face value in order to create a material issue of fact; there must be

some evidence supporting the allegation to survive summary judgment. *Seven Gables Corp.*, 106 Wn.2d at 13. Ms. Gunderson alleges three particular statements by Millwood. In the first, she states that she contacted a city clerk regarding the roughness of the railroad right-of-way, and was informed that the problems would be fixed. The second statement is in her answer to interrogatories where she alleges that she attended city hall meetings and was assured that safe access would be provided. Finally, she states that when complaining about the right-of-way, she was informed that it was a county issue, not a city one.

The first and second statements are simply too vague and self-serving under *Babcock* to amount to an express assurance; moreover they are unsupported by the record. Neither statement is an assurance of on-going access; one talks about "rough" access and the other about "safe" access. The third statement is simply not an express assurance of any kind, since Ms. Gunderson was explicitly told that Millwood would *not* act to correct an issue on county land. Under *Babcock*, the record fails to establish that a genuine issue of material fact exists as to whether an express assurance was given. In addition, the record does not show that any of the alleged assurances were incorrect. *Babcock*, 144 Wn.2d at 789.

Ms. Gunderson also is not able to demonstrate a genuine material issue as to

detrimental reliance. Although the question of whether a party justifiably relies upon information is ordinarily not amenable to summary judgment, the trial court may nevertheless look to the facts before it to determine whether the plaintiffs could rely upon assurances given by the municipality. *Id.* at 792-793. For the government to be bound, the plaintiffs must have detrimentally relied upon the assurances. *Id.*

Here, even when viewing the record in a light most favorable to Ms. Gunderson, there is no evidence of reliance, since she continued to complain throughout the duration of the construction project. There also was no detrimental reliance since it is apparent that access to Sun Beans was not worsened by reliance upon any of the assurances allegedly given by Millwood.

For all of these reasons, the negligence claim is barred by the public duty doctrine. Ms. Gunderson is unable to show any genuine issues of material fact exist that would impose a duty under either the rescue doctrine or special relationship exception. The trial court did not err in granting summary judgment.

Affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Korsmo, A. C. J.

WE CONCUR:

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Sweeney, J.

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Brown, J.